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Supreme Court of the United States

OCTOBER TERM, 1962.

No. 232

LIBERIAN CARRIERS INC. and R. J. CHIANELLI,

Petitioners,

against

TAMPA SHIP AND DRY DOCK CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ~~CIRCUIT~~ COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX.

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TAMPA SHIP AND DRY DOCK CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioners Liberian Carriers, Inc. and R. J. Chianelli pray that a writ of certiorari issue to review a decree and judgment of the Court of Appeals for the Second Circuit entered May 3, 1962 in consolidated causes, pursuant to an opinion of that Court dated and filed March 23, 1962 after rehearing was denied on May 1, 1962 which affirmed a decree and judgment of the United States District Court for the Southern District of New York.

JURISDICTION.

Jurisdiction of this Court is provided by Title 28 U. S. Code Section 1254 (1) and this petition requests this Court to exercise its discretion to review the decision pursuant to its Rule 38, Section 5 (b).

The Proceedings and Decisions Below.

Your petitioner Liberian Carriers, Inc., hereinafter sometimes called shipowner sued in admiralty in the Southern District of New York to recover damages sustained by reason of breaches of contractual arrangements with the respondent shipyard to reengine tank ship *Alpha* involving a sale of reciprocating steam propulsion machinery originally installed in a wartime Canadian corvette and the shipyard's agreement to recondition, install, place in operating condition to Lloyds' approval and warrant performance of the machinery. Damages were claimed for Respondent's failure to complete the work in the time specified, failure to recondition and install the machinery in accordance with the contract and for breach of warranty. Respondent filed a cross suit in admiralty for a balance of payments claimed due to it by petitioner and a civil action against R. J. Chianelli and another upon a guarantee of a note given by petitioner Liberian Carriers, Inc. for the balance claimed to regain possession of the vessel. The co-guarantor is out of the country and defaulted.

The District Court dismissed the suit of petitioner Liberian Carrier, Inc. and granted a decree against Liberian Carriers in the cross suit and a judgment against R. J. Chianelli, in the civil action for the sums claimed by respondent shipyard and costs, holding that the contract period for completion of the work had been extended by a period equal to or more than the thirteen days in excess of the period originally specified utilized by respondent to complete the work by shipowner petitioner's requests for extra work, despite a contract provision that extensions of time be agreed in writing and the absence of any written

extension; that the warranty with respect to speed and performance of the vessel after installation of the machinery had been lost because it was not included in a contract the trial Court deemed to have integrated and superseded all prior contractual arrangements of the parties and that the Yard performed its obligation with respect to reconditioning and installation by obtaining a certificate of approval from Lloyds surveyor upon completion of the work or at any rate that petitioners had not proven that deficiencies in machinery performance were due to defective work by respondent.

The Court of Appeals affirmed the District Court's decision but adopted, as its ground for denying the claim for failure to complete the work on time, a finding of fact not made by the District Court with respect to a hotly disputed issue of fact to the effect that the contract period had been extended exclusively by reason of orders for certain inner bottom work and not by the aggregate of all of shipowner petitioners' requests for extras and that requests for additional work of this character, unlike requests for other extras, operated to extend the contract period for completion of the work without an agreement in writing. The grounds relied upon by the Court of Appeals for affirmance of the balance of the District Court's decision were substantially the same as those on which the latter Court based its decision.

Facts.

Late in 1956 the Suez Canal crisis caused tanker use and sales values to rise abruptly. Petitioner Liberian Carriers Inc., previously a corporate shell, was activated to acquire and reengine the tanker *Alpha* to take advantage of the opportunity if feasible arrangements for reengining

her could be made. Respondent shipyard wished to sell propulsion machinery removed from a scrapped corvette hull and entered into an agreement which the Court of Appeals has referred to as a "Memorandum of Understanding", and the Trial Court as a "so-called letter of Intent", whereunder the respondent shipyard agreed that it would recondition and install the corvette's machinery in the *Alpha*, put it in condition to pass Lloyd's special survey and guaranteed that with "this equipment on board the vessel will make as least 10 knots fully loaded maybe more", and that the work would not take over 40 days. It was contemplated that the vessel would be subsequently surveyed and detailed specifications written up. The contract set the price for the engine and installation work only within certain limits and contained provisions for escape in certain contingencies but fully bound the parties in other contingencies.

In reliance on the agreement petitioner purchased the *Alpha*, caused specifications to be drawn, agreed to pay the maximum price set in the initial contract and sent the *Alpha* to the respondent's yard for the installation. After the vessel arrived at the shipyard another agreement incorporating all those provisions of the earlier contract which had been more precisely defined, modified or added to in negotiations conducted by petitioner and respondent's naval architect and officers after the date of the first contract and the specifications agreed upon was prepared and executed without the aid of lawyers. This is referred to by the Court of Appeals as the "Formal Contract".

The important provisions of the original contract that were modified or rephrased were to the effect that the 40-day period for completion of the work was to commence on the date of approval of three basic plans by Lloyds, the

classification society in which the vessel was entered, that the penalty for late delivery was to be $2,000 a day for ten days, that the work was to be performed "to Lloyds approval and installed with such piping and valves as required to place the propulsion machinery in operating condition to Lloyds approval", that extra work would be performed for extra pay and extension of time if required, and that extensions of time were to be agreed upon in writing at the time extra work was "authorized by owner". The contract price was fixed at $225,000, the terms of payment set and it was agreed that the work covered by the contract price was defined by the incorporated specifications. Nothing was said about speed warranty in the agreement. It is petitioner's position that the omission is due to the fact that warranty was not redefined or changed and that there is no basis for the decision below that this warranty which induced the contract in suit was abrogated, abandoned or revoked by the silence of the second agreement with respect to it.

It is clear that the parties contemplated that the work would be inspected by a Lloyd's surveyor while it was being done and could be adequately surveyed. Unknown to the petitioners the surveyor assigned to the work was incapacitated by cancer and respondent went ahead with the work without making any arrangement for its inspection by a Classification Society surveyor while it was in progress until most of it had been completed, closed up and rendered unsurveyable.

Numerous extras were requested by owners approved by Lloyds and agreed upon as to specification and in most instances as to price during the progress of the work and no agreement for any extension of time written or oral was made. Every request for such extension by the

respondent shipyard in the course of negotiations concerning extras was rejected. The Yard took 53 working days to do the work instead of 40. As it neared completion replacement for the incapacitated classification society surveyor was arranged. He professed to approve the installation on the basis of observation made at a dock trial in which the machinery was operated at only a fraction of full speed.

Contract for the vessel's use on successive voyages entered into at high crisis rates was cancelled because of the vessel's late delivery and renegotiated at a low post crisis rate for a single voyage. Respondent shipyard refused to deliver the vessel so that the renegotiated commitment could be honored until agreement had been reached upon what the petitioner regarded as inordinate demands for those extras with respect to which no agreement as to price had been made and until shipowner gave a note and petitioner Chianelli gave a guarantee of payment of a balance of the renegotiated price which shipowner was unable to pay in cash. The note included a statement in which shipowner purported to "accept" the work.

The machinery installed by respondent's shipyard performed so badly that the voyages performed after redelivery of the ship were described as nightmares. The vessel never made speeds at all close to 10 knots. All of petitioner's funds were spent in attempts to rectify machinery conditions and the *Alpha* was finanlly seized by creditors and sold in Spanish Morocco for about her scrap value.

Questions Presented.

1. Was the finding of the Court of Appeals for the Second Circuit that the shipyard was entitled to an extension of 13 days or more in the contract period for completion of the work exclusively by reason of extra inner bottom work, differing materially from the Trial Court's finding that such extension resulted from the aggregate of "owner's request for extras", within the scope of appellate review under modern rules regulating and limiting such review or was it an improper exercise in the cross suit of lapsed powers formerly exercised when an Admiralty appeal was truly "a trial *de novo*" in the course of which an Appellate Court could make findings of fact with respect to disputed issues not passed upon below and change such findings, whether or not they were clearly wrong. The former practice was held inconsistent with modern rules regulating Admiralty Appeals in *Petterson Towing & Lighterage Co.* v. *New York Central RR Co.* (CCA 2 1942) 126 F. (2d) 992, *International Milling Co.* v. *Brown Steamship Co.* (CA 2 1959), 264 F. 2d 803, and *U. S.* v. *Staples* (CA 9, 1958), 256 F. 2d but nevertheless is tacitly followed on numerous occasions, including this one, in the absence of clear ruling by this Court on the extent of the change in law. As the cross suit is joined with a civil action the decision also raises the question of the scope of Appellate review of fact issues in the light of rule 52 of the Rules of Civil Procedure.

2. Was the decision of the Court below that the respondent shipyard was entitled to an extension of the contract period for completion of the work without an agreement in writing it conceded to be necessary in the case of other extras because such work although ordered

after execution of the contract and for extra compensation, was of a nature, that the original contract specifically contemplated might be required, a proper construction of a contract containing an important and widely used provision requiring extensions of time on account of extra work and other causes of delay to be agreed in writing.

3. Were the Courts below justified in disregarding the clear indication that the parties had contracted that the work be inspected during its progress by an independent classification surveyor, contained in the language of the agreement and demonstrated by the conduct of the parties, and in holding the yard could substitute classification society approval based upon observation of machinery performance at an inadequate dock trial for such approval based upon daily inspection or does such an interpretation of the Respondent shipyard's obligation, greatly reducing the safeguards to life and property to be entrusted to a ship at sea afforded by provisions for impartial inspection and approval by a Classification Society, contravene public policy and misconstrue the contract.

4. Was the provision of the contract requiring shipyard to recondition and install vessel propulsion machinery and place it "in operating condition to Lloyd's approval" correctly interpreted by the Court below as requiring the shipyard only to obtain the approval of the Classification Society regardless of whether the machinery was in fact put in safe operating condition by the shipyard or is such construction erroneous and against public policy because it involves inordinate risk to life and property at sea and is contrary to the intendment of the agreement.

5. Was the decision of both courts below that a warranty with respect to vessel speed and performance forming a

vital element of the inducement to contract was lost by failure to reiterate the warranty in a clarifying contract redefining or modifying other terms of the contract containing the warranty a correct application of the law pertaining to warranty in contracts for the sale and installation of machinery in the absence of any expressed intent to revoke the warranty or to confine seller's obligation to these stated in the subsequent contract.

The Reasons for Granting the Writ.

1. The question as to whether the adaption by the Court of Appeals of a finding with respect to an extension of the contract period for completion of the work differing in material and basic respects from that of the trial court is within the scope of appellate review in Admiralty under modern rules is a fundamental and important question with respect to which the law has been changing in recent years and which has been the source of confusion and uncertainty and is ripe for clarification and decision by this Court. The extent to which Appellate Courts should make findings on appeal in a civil case also merits clarification.

2. The questions of contract construction relating to the obligations of the respondent shipyard respecting inspection and the degree of shipyard responsibility for installing machinery that is safely operable in an ocean going ship, under a contract incorporating customary ship repair and alteration practice are important questions to shipowners, their underwriters and all who use ships serviced and maintained here, which have been decided incorrectly below and

in a manner contrary to the public interest. The narrow construction placed upon the requirement for written agreement to extensions of time is also an important question which was incorrectly decided.

3. The question with respect to the holding that the warranty in suit was abrogated by omission from a subsequent contract is an important question of the law relating to sales and repair work which was incorrectly decided below and should be corrected in the interest of clarification and uniformity of the commercial law.

ARGUMENT

POINT I.

THE COURT OF APPEALS EXCEEDED THE PROPER SCOPE OF APPELLATE REVIEW BY MAKING A FINDING MATERIALLY DIFFERENT FROM THAT OF THE TRIAL COURT ON A DISPUTED MATERIAL ISSUE OF FACT INSTEAD OF REMANDING FOR FURTHER FINDINGS BY THE DISTRICT COURT.

The District Court denied petitioner a recovery on account of the Yard's admitted failure to complete the work in the 40 days in which it stipulated in both the initial and subsequent contract it would do the work specified in the contract and the undisputed fact that it took the shipyard at least 53 days to complete the work because:

> "There was no delay by the shipyard in completion of its work beyond 40 working days that was not caused by requests by owners for extra work that, by the terms of the contract, extended time for completion as much or more than the thirteen work-

ing days used in completing the work on the ship beyond said period of 40 working days specified in the contract."

(Oral opinion Record Vol. I p. 520, Finding of Fact 10 Record Vol. I p. 558). A penalty of $2,000 a day for the first 10 days delay was specified in the contract and petitioners contend they are entitled to their actual damage from delay which are higher because a penalty should be disregarded.

On appeal petitioner contended that the District Court finding in so far as it concluded that owner's requests for extra work had extended the contract period, was erroneous as a matter of law because it ignored Article 7 of the second contract referred to by the Court of Appeals as the "formal contract" providing.

"ARTICLE 7. DELAYS AND EXTENSIONS OF TIME.

If the Shipyard be delayed at any time in the progress of the work by any act beyond its control, not imputable to the shipyard, or by changes ordered in the work, then the time of completion shall be extended a like amount. Such additional time is to be agreed upon between Owner and Shipyard, in writing, at the time the delay occurs and/or at the time the change and/or extra is authorized by Owner."

The Court of Appeals found as it stated in the opinion that:

"The work was delayed not by any changes which were ordered after the execution of the contract, but

> by work on the inner bottom which was contemplated by the contract itself"

and that

> "In fact the evidence establishes that no changes were ordered and that the 'extra work' was that contemplated at the time of the execution of the contract and referred to in Article 1."

Petitioner disputes and will discuss hereinafter in point II of this Brief the fallacy in the Court of Appeals conclusion that the fact that extra work might be required on the inner bottom was adverted to in the contract somehow prevented extra work of this character agreed upon after the execution of the contract from being a cause of delay within the contemplation of Article 7 requiring any extension of time necessitated thereby to be agreed upon. For the purpose of this point we assumed the correctness of the Court of Appeals on the question of interpretation.

The decision of the Court of Appeals on the claim for delay is clearly based on its finding of fact that the inner bottom work alone required at least an extra 13 days to perform over and above the time needed to do any such work that could be performed simultaneously with contract work as Article 10 of the second contract provides.

> "If any extra work to be done for owner's account can be done concurrently and/or simultaneously with the normal contract work under this agreement which will be for shipyard's account, no extra days will be added to the normal period of 40 working days."

The length of extra time if any required by inner bottom work was in sharp dispute at the trial. Petitioner's experts testified the work could done in 4 days (Record Vol. I pages

415-420). Petitioners vigorously contended that all of this work could and should have been done simultaneously with contract work and indeed the Yard never contended that it could not have been so performed. It based its argument for an extension upon the claim that it was delayed because owner failed to authorize the work promptly after it was required by Lloyds (Appendix p. 463). This contention flies in the face of the Yard's letter to Lloyds dated February 11 stating "we commenced work on these items on January 29, 1956 following receipt of your letter of January 24, conveying your approval. * * *" (Lib. Ex. I). The fact is that the contract did not require owner's approval but provided that the yard should do any such work that might be required by Lloyds or the owner for 60¢ a pound of installed steel. Moreover the yard never did obtain owner's approval (Appendix pages 209-266, 459-408). No competent evidence was submitted by the yard as to how long it would take to do the double bottom work ordered by Lloyds and the record furnishes no basis for finding that such work necessarily delayed the performance of the contract by 13 days.

The Trial Court deliberately refrained from making any finding on this disputed issue and confined itself to a finding that the aggregate of all of owner's requests for extras extended the contract period by the 13 extra days used. There were many such extras (Lib. Ex. 54 through 96). The shipyard performed all the extra work without obtaining any agreement or an extension of the time for completion of the work.

The finding of the Court of Appeals that the work period was extended 13 days or more by a requirement for extra bottom work alone was not a mere interpretation of the trial court's finding. It was an entirely new and

independent finding with respect a vital issue of fact on which the trial court made no finding. That is beyond the scope of appellate review unless it should be true that an appeal in admiralty is still a trial de novo as this Court declared it to be in *Reid* v. *Fargo*, 241 U. S. 544 at the time that case was decided. The Court of Appeals for the Second Circuit carefully reviewed the history of the doctrine that an appeal in admiralty constituted a new trial in *Petterson Towing & Lighterage Co.* v. *N. Y. Central RR Co.* (CCA 2, 1942) 126 F. 2d 992 and in *International Milling Co.* v. *Brown Steamship Co.* (CA 2, 1959) 26 F. 2d 803 and concluded that the adoption by this Court of Rule 46½ of its Rules of Practice in Admiralty and Maritime cases requiring District Court findings of fact and other rules had effectively emasculated the doctrine. It held that the Court of Appeals in an admiralty case had no greater power to alter District Court findings of fact than it had in any civil case outside the admiralty where the District Court findings are made pursuant to Federal Rule of Civil Procedure 52. Under the latter Rule most Courts of Appeal have held that where the District Court findings are silent with respect to any issue of fact deemed by the Court of Appeals to be dispositive of any facet of the case the Court of Appeals must remand and require the District Court to make findings covering the issue and may not properly find such facts itself: *Marlborough Corp.* v. *U. S.* (CA 9, 1949) 172 F. 2d 787; *McClure* v. *O'Henry Tent & Awning Co.* (C. A. 7, 1950) 184 F. 2d 636; *Paramount Pest Control Service* v. *Brewer* (CA 1949) 177 F. 2d 564; *Hunter Douglas Corp.* v. *Land Oil Products Inc.* (CA 9, 1954) 215 F. 2d 372. The same rule has been applied Admiralty, *Mosher* v. *Tate* (CA 9, 1949) 182 F. 2d 475, 478.

The court below recognized in the *Petterson* case and *International Milling Co.* cases *supra* that there have continued to be spectral survivals of what these cases declared to be the defunct doctrine of the trial de novo on appeal in Admiralty and now even the Court issuing the doctrine's death certificate has assumed the power to make new findings on a hotly disputed issue of fact, which the trial court avoided deciding, from a reading of the cold record when deciding an appeal in admiralty and at law. It has thereby cast great doubt upon its own acceptance of its prior declaration that the doctrine of a trial de novo is now defunct.

This Court is stated to have been primarily responsible for the change in the law relating to the scope of an Admiralty appeal by adoption of admiralty Rule 46½. It should clear up the confusion and the lingering doubt as to the final passing of the doctrine by considering in this proceeding whether the Court of Appeals exceeded the scope of appellate review in making finding on which it bases its decision without the benefit of having heard or observed the witness and without any indication of what the trial Court would have decided had it passed upon the question.

POINT II.

THE CONTRACT CONSTRUCTION QUESTIONS ARE OF IMPORTANCE AND ARE SQUARELY PRESENTED.

The Court of Appeals made three constructions of provisions of a contract for a major ship alteration that have considerable impact on the servicing of the ship here. First it construed very narrowly a provision requiring written agreement upon all extensions of time on account of extras or other delays beyond the shipyard's control

designed to give shipowners protection against ruinous losses incident to unnecessary delay in the completion of shipyard work and the resumption of lucrative vessel operations after layup for repair or alterations. Second it relieved the shipyard of all responsibility to cooperate with owner in arranging for adequate impartial expert inspection of work affecting vessel's safety and that of persons and property that might embark upon the vessel after completion of the work. Third it relieved a shipyard of responsibility for performing a major alteration so as to put the ship in a condition to be safely operated.

Petitioners submit that all three decisions are incorrect and against the public interest against diminution of responsibility for safety at sea adjudicated in *Risso, etc.* v. *Inland Waterways Corp.* (1955), 349 U. S. 85, *Boston Metals Co.* v. *The Winding Gulf* (1955), 349 U. S. 122 and *The Wash Gray*, 277 U. S. 466. These cases reaffirm the doctrine first announced in the *Syracuse*, 12 Wall 167, that there is a public interest in the preservation of the vehicles and subject matter of seaborne commerce. The public is better served when ships available for its use are in operation and not held in drydock by shipyard lethargy and it is of vital public importance that all parties having to do with servicing of ships be required to take all reasonable precautions affecting safety at sea. The extremely narrow and tortured construction of the contract provision quoted in the previous point of this brief requiring a shipowner's written agreement to extentions of time removes much of the efficacy of time limitations as a spur to the prompt return of vessels to commercial use.

The contract had numerous provisos for performance of extras other than inner bottom work. Article I provides for work in addition to that specified in the contract on pro-

peller, sea chest, piping and machinery and ship's equipment to be done as extras with necessary extensions of time. The inner bottom work was actually ordered and accepted after execution of the contract as were other extras. There was no basis for treating the requirement that extensions of time on account of any delay or extra be agreed in writing as inapplicable to inner bottom work. The other extras contemplated do not differ in any essential from the provisions concerning inner bottom work.

Relief of the shipyard from all responsibility for insuring inspection of the work by the Classification Society as the contract contemplated and the equally sweeping relief of the shipyard from all responsibility for seeing to it that the ship was redelivered in operating condition, which can only mean safe operation condition, sweeps away all shipyard responsibility for vessel conditions resulting from its work, a result which judicial construction of such contracts should seek to avoid, not foster. *Newport News Shipbuilding and Drydock Co.* v. *United States* (C. A. 4 1950), 226 F. (2d) 137, *Doughnut Machine Co.* v. *Bibby* (C. A. 4), 65 F. 2d 634, *Sharp* v. *G. W. Ry. Co.*, 152 Eng. Rep. (Ex.) 4 (1841). There is no question of shipowner's right to recover either the penalty provided in the contract or its actual higher damages per day of unexcused delay if there was no extension of the contract period.

Both the Trial and Court of Appeals opinion give the impression that the shipowner has not shown damage or breach of contract by the shipyard from lack of inspection or improper work even if the Court were wrong with respect to the points of construction affecting the shipyard's obligations relating thereto. A close reading will demonstrate that neither impression is warranted by the actual findings or the evidence. There was voluminous essentially uncontrovertible evidence both that the machin-

ery performed very badly after redelivery and that subsequent inspection revealed that the installation was defective in respects that should have been corrected in the performance of the shipyard's obligation to recondition the machinery and put it in operating condition. Apparently the District Court accepted the contention of the shipyard that the shipowner had not established that the wretched machinery performance was not due to crew malfeasance because it was unable to adduce the testimony of members of the engineroom crew, who scattered to the four corners of the earth after the vessel was sold in Ceuta, Spanish Morocco. On the other hand the evidence of the defective and inoperative state of many parts in the machinery from experts who examined it at the close of the first trouble-plagued voyage to Cuba from Tampa was so cogent that both Trial Court and the Court of Appeals carefully refrained from finding that the machinery had been properly reconditioned or made operable. The trial court found the shipyard had fulfilled its obligations because and only because Lloyd's approval had been obtained and owner had accepted the work. The Trial Court's finding is

> "8. The work * * * to be performed by the shipyard * * * was to be performed to Lloyd's approval * * * The Court finds that the shipyard fully performed the foregoing undertaking as evidenced by Lloyd's certificate of approval, and Liberian's approval and acceptance of the work" (App. p. 519).

The Court of Appeals states:

> "Liberian claims defects in both the machinery and its installation. The lower court found these claims unproven. Not only do we find no clear error in the findings, but the contract upon which the claims are based provided that the work should be done 'to

> Lloyd's approval'. Since Lloyd's approval was secured, the condition of the contract was fulfilled."

The Court of Appeals description of the trial court findings ignores the fact that the trial court found only that Lloyd's approval had been secured and the work "accepted" and that that was the sole responsibility of the yard with respect to the condition of the machinery. The trial court's language with respect to lack of proof is confined to the connection between various operating difficulties experienced by the vessel and defective work. The decision of both Courts on this point can be upheld only if their construction of the contract confining the yard's obligation to getting Lloyd's approval is also accepted. That construction is patently erroneous.

The contract clearly required that the vessel be put in operating condition and that Lloyd's approve the work as effective to put her in that condition as well. Moreover the contract clearly contemplated that the classification Society representative inspect the work as it was being done. There is no dispute but that arrangements to have this done had been made and were frustrated only by the illness of the Lloyd's surveyor. The parties' construction of the meaning of the inspection provisions is thereby made clear. It was reinforced by expert testimony as to the meaning attached to such provisions in the trade (Record Vol. I pp. 409-413). The yard had no right to proceed until its work had been impartially inspected and approved. Neither court below reached the question of damages from noncompliance with the obligation. There was ample evidence of undiscovered deficiencies and the *quantum* of the damages should be referred to a commissioner.

POINT III.

THE DECISION BELOW THAT THE SPEED WARRANTY WAS ABROGATED BY OMISSION FROM AN INTEGRATING CONTRACT IS AN ERRONEOUS DECISION OF AN IMPORTANT QUESTION OF COMMERCIAL LAW.

The Court of Appeals' decision respecting breach of warranty is framed as a finding of fact as to the intention of the parties. The fact however is that the parties were silent about the warranty at all times after it had been expressly incorporated in the first contract between them. The issue to be decided is whether a specific warranty obviously furnishing the major inducement to contract may be lost if the parties enter into a second contract which does not state it is to become the entire agreement between the parties without mentioning it and there are grounds for judicial speculation that perhaps the second contract was intended to "integrate their entire agreement".

All of the matters taken up in the second contract related to physical performance by the parties, the work to be done, the approvals to be obtained, the payments to be made, the time of performance etc. The second agreement incorporates matter dealt with in the first only where modifications or additions to the provisions of the first agreement were worked out in the course of negotiations between the signing of the first and second contract. All of the agreements contained in the second contract are consistent with those contained in the first, unless it be true as the Court below held that silence about the warranty was tantamount to its abrogation. The second agreement was not intended as a repository of all the obligations concerning the work because it provided for numerous sub-

sidiary contracts concerning extras which were in fact subsequently made.

The Courts are not free to treat silence as a rescission of a specific binding written warranty any more than they are free to treat silence as tantamount to cancellation of a bond. The only possible reason for treating silence as an effective expression of intent to abrogate a written warranty is as an application of some vestige of the outworn doctrine that the last contract made between the parties merges all preceding contracts based upon the same rationale as that of the parol evidence rule, a doctrine which the Court below in *Zell* v. *American Seating Co., Inc.* (CCA 2 1943), 138 F. 2d 641, reversed by this Court so decided as to have no majority for any ground of reversal at 322 U. S. 709 709, (1944), denounced as a carryover of primitive beliefs in contract ritual and the need for safeguards against irrational jury verdicts. Modern cases recognize that a warranty is not lost because it is not included in a subsequent contract dealing with the mechanics of a sale or repair, *Distillers Distributing Corp.* v. *Sherwood,* (CAA 4, 1950) 180 F. 2d 800; *Richfield Oil Corp.* v. *United States,* (C. A. 9, 1957) 248 F. 2d 217; *Universal Major Electrical Appliances* v. *Glenwood Range Co.* (C. A. 4, 1955) 223 F. 2d 76; *Harris* v. *Marsh,* (C. A. 9, 1914) 217 F. 2d 555; *Briggs* v. *Hilton,* N. Y. C. A. 1885, 99 N. Y. 517.

It is time that this Court finally put to sleep any surviving notion that failure to reiterate all the terms of every preceding agreement in each subsequent agreement in the style of the House that Jack built precludes the enforcement or even the mention of any unrepeated obligation. It is not the law that a specific written warranty

is to be treated as effectually rescinded by silence alone: whatever the thoughts and unexpressed intentions of the silent representatives of the parties may be.

Respectfully submitted,

RICHARD H. SOMMER,
Attorney for Petitioners.

EDWARD L. SMITH
and
KIRLIN, CAMPBELL & KEATING,
Of Counsel.

Court of Appeals Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 215—September Term, 1961.

(Argued February 8, 1962 — Decided March 23, 1962.)

Docket No. 27134

LIBERIAN CARRIERS, INC.,
Libellant-Appellant,

v.

TAMPA SHIP REPAIR & DRY DOCK CO. INC.,
Respondent-Appellee.

TAMPA SHIP REPAIR & DRY DOCK CO. INC.,
Libellant-Appellee,

v.

S.S. "ALPHA" and LIBERIAN CARRIERS, INC.,
Respondent-Appellant.

TAMPA SHIP REPAIR & DRY DOCK CO. INC.,
Plaintiff-Appellee,

v.

R. J. CHIANELLI,
Defendant-Appellant,

and

J. F. SWENSON,
Defendant.

Before:

LUMBARD, Chief Judge,
WATERMAN and HAYS, Circuit Judges.

Court of Appeals Opinion.

Appeals from a decision of the United States District Court for the Southern District of Connecticut, Fred A. Wham, Judge, holding appellants liable to appellee for the unpaid balance on contract for installation of machinery in a vessel.

Affirmed.

EDWARD L. SMITH of KIRLIN, CAMPBELL & KEATING, New York, N. Y., for Appellants.

ALLAN A. BAILEIE of HEALY, BAILEIE & BURKE, New York, N. Y. (WALTER G. MCNEILL, of counsel, on the brief), for Appellee.

HAYS, Circuit Judge:

These cases, which were consolidated for trial, arise out of a contract under which Tampa Ship Repair and Dry Dock Co. Inc. agreed to sell to Liberian Carriers, Inc. certain propulsion equipment and to install the equipment in a vessel owned by Liberian. Liberian sues Tampa for damages for breach of the contract; Tampa sues Liberian for the unpaid balance on a note given to Tampa in partial payment. The third suit is by Tampa against the guarantors on Liberian's note. The decision of the lower court found for Tampa and against Liberian on all issues. We affirm.

Liberian claims defects in both the machinery and its installation. The lower court found these claims unproven. Not only do we find no clear error in the findings, but the contract upon which the claims are based provided that the work should be done "to Lloyd's approval". Since Lloyd's approval was secured, the condition of the contract was fulfilled.

Liberian claims breach of an express warranty as to the vessel's speed after re-engining. Such a warranty was included in a memorandum of understanding executed some

time prior to the execution of the formal contract under which the work was done. The formal contract contained no warranty of speed. We agree with the lower court that it was the intention of the parties to integrate their entire agreement in the formal contract, and that the formal contract superseded the earlier memorandum of understanding.

Finally Liberian claims damages on the ground that the work on the vessel was not completed within the time limited in the contract. The work took 53 days. Liberian claims that Tampa agreed to complete the work in 40 days.

Article 7 of the contract provides:

> If the Shipyard be delayed at any time in the progress of the work by any act beyond its control, not imputable to the Shipyard, or by any changes ordered in the work, then the time of completion shall be extended a like amount. Such additional time is to be agreed upon between Owner and Shipyard, in writing, at the time the delay occurs and/or at the time the change and/or extra work is authorized by Owner.

There was concededly no written agreement for any extension of time.

The question is whether the work which occasioned the delay was the result of "any changes ordered in the work." If it was so occasioned then, presumably, Tampa could have protected itself from liability under Article 7 only by having demanded the written agreement required by that Article.

However, the work was delayed not by any changes which were ordered after the execution of the contract, but by work on the inner bottom which was contemplated by the contract itself. Article 1 provides:

> Any steel work required by the Owner or Lloyds in the form of modifying existing floors, additional inner bottom plating or tank top doublers, will be done by

Shipyard at an agreed extra price based on welded structure at 60¢ per pound installed and an extension of time, if required, over and above [the 40 day limit].

While the trial court's finding on this point, i. e., that there was no delay "that was not caused by requests of the owners for extra work" is somewhat ambiguous, it is to be noted that the finding does not refer to any "changes" ordered by the owner. In fact the evidence establishes that no changes were ordered and that the "extra work" was that contemplated at the time of the execution of the contract and referred to in Article 1.

Since the delay caused by work done by Tampa under Article 1 is not the delay for which a writing is required under Article 7, the absence of a writing does not allow Liberian to recover for the delay.

Liberian's claim of commercial duress finds no support in the evidence.

Judgment affirmed.

District Court Opinion and Findings.

New York, May 31, 1961.
2:00 o'clock p. m.

The Court: I have tried to handle the case in disposing of it by my memorandum of decision in such a complete way, so far as the issues are concerned, that if the case be appealed, that the Court of Appeals will have an idea as to my findings on the particular factual issues that are in the case, and it might prevent a possible retrial and a vast expenditure of expense money to try it again.

I will say, however, that my findings omit making findings on issues that are not in dispute at all, just more formal allegations and denials and whatnot, but I am making this report by way of memorandum to lawyers who are

thoroughly familiar with all of the aspects of the case and therefore you do not need treatment as fully as if I were writing it for publication in order to become an authority of some sort, which I am not.

MEMORANDUM AND DECISION

After hearing and reading the transcript of the final arguments of counsel and after reviewing the evidence and cited authorities, I have reached conclusions and made findings as follows. Now, I might say that in the findings and conclusions, I have not attempted to divide conclusions from findings, and you will find them rather commingled.

1. The Tampa Ship Repair & Dry Dock Company is entitled to succeed in each of the three cases before the Court consolidated for trial, namely, Civil 129-47 and Admiralty Nos. 192-128 and 192-328.

2. Plaintiff is entitled to recover the full balance due on the promissory note given plaintiff by Liberian Carriers, Inc. on May 6, 1957, which balance is in the amount of $40,825.75 with interest thereon at 5 per cent per annum from May 6, 1957, and costs of suit and reasonable attorneys' fees, fixed by the Court in the amount of $3,500.

This sum of attorneys' fees is arrived at on the basis of recovery on the note alone in a contested lawsuit and makes no allowance for counsel's services and fees in the admiralty cases.

I assume that Admiralty No. 192-128 would (1431) have been filed in any event, and therefore it is a part of a bigger lawsuit than the recovery on the note.

3. Plaintiff is entitled to recover the full balance due on said promissory note with interest, costs and attorneys' fees as set forth above in paragraph 2 against R. J. Chianelli and J. E. Swenson individually, each of whom personally endorsed and guaranteed payment of the note.

Also, plaintiff, referring to Tampa, is entitled to succeed in its cross-libel in Admiralty No. 192-328.

4. Liberian Carriers, Inc. has failed to carry its burden of proof and has failed to establish its right to recover from Tampa Ship Repair & Dry Dock Co., Inc. in admiralty suit No. 192-128.

5. Liberian Carriers, Inc. and R. J. Chianelli and each of them has failed to prove and establish any of the defenses set forth in the pleadings to the right of Tampa Ship Repair & Dry Dock Co., Inc. to recover the balance due upon said promissory note in accordance with its term.

These findings now become more specific as to the actual factual issues.

6. The so-called letter of intent signed by the parties on November 16, 1956, was fully and completely superseded by the later contract between the parties signed on December 27, 1956, which later contract, after its execution, constituted the entire contract in writing between the parties.

7. The shipyard—I might say I sometimes refer to Tampa Ship Repair as shipyard—the shipyard did not undertake by contract or otherwise to enable the converted ship to attain any specific standard of speed after otherwise performing its duty under the contract in accordance with its terms.

8. The work specified by the contract to be performed by the shipyard, including both the reconditioning of the machinery and the engine to be installed in Liberian's *SS Alpha* and the installing of same in the *Alpha*, was to be performed to Lloyd's approval. The contract, after listing the items to be installed, provided:

> "The above-listed equipment shall be reconditioned by the shipyard to Lloyd's approval and

installed with such piping and valves as required to place the propelling machinery in operating condition to Lloyd's approval."

The Court finds that the shipyard fully performed the foregoing undertaking as demonstrated at the dock trials and by Lloyd's certificates of approval and Liberian's approval and acceptance of the work.

9. The Court further finds that Liberian was given opportunity to and did inspect the engine, boilers and other machinery which the shipyard proposed to install in the *Alpha*, and only after said inspection did Liberian agree to purchase same and have same installed in its ship *Alpha*.

10. The Court further finds that such installation was performed in accordance with plans and specifications drawn by the shipyard and approved by Liberian after changes therein suggested both by Liberian and Lloyd's; that such installation was performed under the general supervision of Lloyd's and to its approval and under the supervision of Liberian's naval architect and the constant supervision of ship's captain J. F. Swenson, who was part owner of Liberian and an officer of the corporation.

11. The Court further finds that the contract between the parties and the specifications did not provide for a sea trial and Liberian refused to authorize a sea trial.

12. The Court further finds that at the time the ship was tendered to Liberian as completed under the contract, with a final statement of account by the shipyard covering balance claimed to be due for the installation of engines, boilers and machinery and for extras, Liberian disputed the account and did not have enough money to pay for same in full. The shipyard had asserted its lawful lien on the vessel for the payment of the account and was hold-

ing the vessel under said lien. After lengthy negotiations a compromise agreement was reached under which the shipyard substantially reduced its claim against Liberian and the ship and agreed to accept the cash Liberian was able to pay and to accept Liberian's promissory note for the unpaid balance, if the note were personally endorsed and guaranteed by Chianelli and Swenson. By terms of the promissory note the parties agreed that "$48,825.75 represents the balance due on the work performed by the above shipyard on the *SS Alpha*, which work has been approved and accepted by the owners." After such compromise settlement shipyard released the *Alpha* to the owners.

13. The Court finds that the shipyard did not acquire said promissory note, so endorsed and guaranteed, by exercise of duress, economic or otherwise, and the defense of duress is not a valid defense under the law and under the evidence in this case.

14. There was no delay by the shipyard in completion of its work beyond 40 working days that was not caused by requests by the owners for extra work that, by the terms of the contract, extended time for completion as much or more than the thirteen working days used in completing the work on the ship beyond said period of 40 working days specified in the contract.

15. The Court further finds and concludes that, if there had been delay giving rise to a claim for recoverable damages, such damages would have been controlled by the provision in the contract limiting recovery for delay to agreed liquidated damages in the sum of $2,000 per day, and not exceeding a total or maximum of $20,000.

16. The Court further finds that Liberian is not entitled to recover damages on account of charter party dated February 24, 1957, covering five voyages carrying cargoes;

that the shipyard was not advised of such charter party either before or during the progress of the work on the *SS. Alpha*, though the shipyard was aware that Liberian was deeply interested in getting the ship at the earliest date possible so as to put it into service.

17. The Court finds and holds that in view of the fact that Liberian inspected the engine and equipment before it purchased same for installation and supervised the installation through its naval architect and through the captain of the ship, who was a stockholder and officer of Liberian Carriers, Inc., and received Lloyd's certificate of approval of the shipyard's work pursuant to the contract and had waived a sea trial and had taken the ship from the shipyard to Port Tampa for refueling before the time of entering into the compromise settlement with the shipyard and, in such settlement, approved and accepted the work performed by the shipyard on the *SS. Alpha*, it would appear and the Court holds that Liberian waived any claim for damages whether on account of delay or defective reconditioning or installation.

18. If Liberian, after accepting and approving the work of the shipyard, could, under the law, assert a proper claim for damages on account of alleged defects in reconditioning and installation of the engine, boilers and equipment, which this Court has held it could not, in such case the burden of proof was on Liberian to establish by a preponderance of the proof that the difficulties experienced in operating the ship as complained of by Liberian were in fact caused by faulty reconditioning or installation by the shipyard. Though the Court permitted Liberian, over objection of counsel for the shipyard, to put in all the proof it had on the issue, Liberian was unable to prove by a preponderance of the evidence, and the preponderance of the evidence fails to show, that the reconditioning and installation were faulty, resulting in the difficulties experi-

enced at sea. The Court is convinced by the evidence that such difficulties arose largely, if not altogether, by reason of the mishandling of the engine and machinery in the engine room by an incompetent, indifferent and inexperienced crew who knew little or nothing about proper care and operation of compensating steam engines. In such state of the evidence, Liberian is not entitled to relief in this libel suit and R. J. Chianelli is not entitled to the benefit of such defense to the promissory note by way of reduction or to any part thereof.

19. Finally, Tampa is entitled to recover the amount paid by Tampa to Mr. Fond for his expenses and services in New Orleans in connection with the repair work done there in the sum of—I am not sure about that amount.

Mr. Baillie: $1108.80.

Mr. Smith: $1108.80.

The Court: Mr. Baillie, you will see that is made exactly in accordance with the evidence when you draw the findings and conclusions.

Now, as is my custom, the reporter will write this up and you will have copies of it, and I will ask you, Mr. Baillie, representing the successful litigant, to prepare the findings and conclusions and necessary orders in order for the Court to sign them after they have been inspected by Mr. Smith and he has been given an opportunity to make any objections or suggestions he wishes to make, and I would like to have that by Tuesday, if I could.

Mr. Baillie: Yes, sir, you will. The proposed decree at the same time, your Honor?

The Court: Yes. And please see that Mr. Smith has an opportunity to examine them.

Mr. Baillie: Yes.

The Court: And if there is really any objection which you wish to urge, Mr. Smith, perhaps both

of you could come here Tuesday morning instead of Tuesday afternoon so that I could finally sign the matter at two o'clock.

Mr. Baillie: Your Honor, may I leave that to my associate? I will be arguing a case on appeal in the First Circuit in New Orleans on Tuesday.

The Court: Well, if you think your associate is competent to take care of your particular interests and knows enough about the case that he won't get me in difficulties——

Mr. Baillie: Oh, yes, I am sure he is.

The Court: And after you have examined the findings and conclusions, Mr. Smith, and the decree as proposed by your opponents, you can come down or not as you please. If you have objections that you wish to urge, of course you will come and do so. If you do not, I will take the unopposed findings and conclusions as not being objected to by you.

Thank you very much for coming.

Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LIBERIAN CARRIERS, INC., Owner of the Tanker "*Alpha*", Libelant, *against* TAMPA SHIP REPAIR & DRY DOCK CO., INC., Respondent.	Ad. No. 192-128
TAMPA SHIP REPAIR & DRY DOCK CO., INC., Cross-Libelant, *against* S. S. *Alpha*, her boilers, engines, etc., and LIBERIAN CARRIERS, INC., Cross-Respondent.	Ad. No. 192-328
TAMPA SHIP REPAIR & DRY DOCK CO., INC., Plaintiff, *against* R. J. CHIANELLI and J. F. SWENSON, Defendants.	Civ. No. 129-47

FINDINGS OF FACT.

1. This is the joint trial of three separate suits. The first is a civil action brought by the payee of a promissory note against the endorsers. The note represents the balance due on a ship repair contract.

The second suit is an action in admiralty by Liberian Carriers, Inc., as Owners of the Tanker "*Alpha*" (hereinafter called "Owners"), against Tampa Ship Repair & Dry Dock Co., Inc. (hereinafter called "Shipyard"), alleging breach of a contract for the installation and reconditioning of steam engines in the SS. "*Alpha*". The Owners specifically allege improper reconditioning and installation of the steam engines, breach of speed warranty asserted to be part of the contract and failure to redeliver the vessel within the time specified in the contract. The Shipyard denied these charges generally, denied that the contract contained a speed warranty and alleged due performance. The third suit is a cross-action in admiralty by Tampa Ship Repair & Dry Dock Co., Inc., against Liberian Carriers, Inc. and the vessel, alleging the making of the note, the payment of one installment and the failure to pay the balance due. No jurisdiction was ever obtained over the vessel *in rem*.

2. On November 16, 1956, the parties signed a one page memorandum which stated:

> "It is agreed that for the maximum of $225,000.00 Tampa Ship Repair & Dry Dock Co., Inc. will take out the old main engine, auxiliary equipment and boiler now aboard the *Alpha* and replace with the main engine, two Scotch boilers and auxiliary equipment aboard and taken off the SS. *Cortes*. * * *
>
> It is further agreed that Tampa Ship Repair shall send a man aboard the *Alpha* now in the port of Boston no later than Monday, November 19, 1956 to make a more detailed report in the hope of revising this price downward and that it is further agreed that the Owners, Liberian Carriers, * * * Tampa Ship Repair also guarantees that with this equipment on board, the vessel will make at least 10 knots fully loaded and maybe more. * * *"

At the time the Shipyard signed this memorandum, it had not seen the vessel, nor had it seen the "*Alpha's*" line plans. The Shipyard only knew the speed at which the steam engine had propelled the "*Cortez*", a wartime corvette.

Toward the end of November, 1956, after the Shipyard inspected the "*Alpha*", it became obvious that no one could predict with any degree of accuracy what the vessel's speed would be after re-efigining. In the early part of December, 1956, several conferences were had, and the parties exchanged four proposed drafts of the final contract. None of these drafts included the ten knot speed warranty. Finally, on December 27, 1956, the parties entered into a formal nine page agreement. This did not mention the 10 knot speed warranty, but did include almost all of the other terms specified in the November 16th memorandum.

The Court finds that the parties intended the contract of December 27, 1956 to completely supersede the memorandum of November 16, 1956, and therefore, that the Shipyard did not guarantee a ten knot speed.

3. The work specified in the December 27th contract included both the reconditioning of the machinery and the installation of the steam engine in the SS. "*Alpha*". All the work was to be performed to Lloyd's approval. The contract, after listing the items to be installed, provided:

> "The above-listed equipment shall be reconditioned by the shipyard to Lloyd's approval and installed with such piping and valves as required to place the propelling machinery in operating condition to Lloyd's approval."

The Court finds that the Shipyard fully performed the foregoing undertaking as demonstrated at the dock trials and by Lloyd's certificates of approval and Liberian's approval and acceptance of the work.

4. There is no evidence to indicate that the Lloyd's representatives were negligent in the manner in which they inspected the vessel. The evidence affirmatively indicates that Lloyd's representatives were satisfied with the vessel's operating condition at the various dock trials.

5. The Court further finds that Liberian was given opportunity to and did inspect the engine, boilers and other machinery which the Shipyard proposed to install in the "*Alpha*", and only after said inspection did Liberian agree to purchase same and have same installed in its ship the "*Alpha*".

6. The Court further finds that such installation was performed in accordance with plans and specifications drawn by the Shipyard and approved by Liberian after changes therein suggested both by Liberian and Lloyd's; that such installation was performed under the general supervision of Lloyd's and to its approval and under the supervision of Liberian's naval architect and the constant supervision of ship's captain J. F. Swenson, who was part owner of Liberian and an officer of the corporation.

7. The Court further finds that the contract between the parties and the specifications did not provide for a sea trial and Liberian refused to authorize a sea trial.

8. The Court further finds that at the time the ship was tendered to Liberian as completed under the contract, with a final statement of account by the Shipyard covering the balance claimed to be due for the installation of engines, boilers and machinery and for extras, Liberian disputed the account and did not have enough money to pay for same in full. The Shipyard had asserted its lawful lien on the vessel for the payment of the account and was holding the vessel under said lien. After lengthy negotiations a compromise agreement was reached under which the Shipyard

substantially reduced its claim against Liberian and the ship and agreed to accept the cash Liberian was able to pay and to accept Liberian's promissory note for the unpaid balance, if the note were personally endorsed and guaranteed by Chianelli and Swenson. By terms of the promissory note the parties agreed that "$48,825.75 represents the balance due on the work performed by the above Shipyard on the SS. "*Alpha*", which work has been approved and accepted by the owners." After such compromise settlement Shipyard released the "*Alpha*" to Owners.

9. The Court finds that the Shipyard did not acquire said promissory note, so endorsed and guaranteed, by exercise of duress, economic or otherwise, and the defense of duress is not a valid defense under the law and under the evidence in this case.

10. There was no delay by the Shipyard in completion of its work beyond 40 working days that was not caused by requests by the Owners for extra work that, by the terms of the contract, extended time for completion as much or more than thirteen working days used in completing the work on the ship beyond said period of 40 working days specified in the contract.

11. The Court further finds that Liberian is not entitled to recover damages on account of the charter party dated February 24, 1957, covering five voyages carrying cargoes; that the Shipyard was not advised of such charter party either before or during the progress of the work on the SS. "*Alpha*", though the Shipyard was aware that Liberian was deeply interested in getting the ship at the earliest date possible so as to put it into service.

12. The Court holds that in view of the fact that Liberian inspected the engine and equipment before it purchased same for installation and supervised the installation

through its naval architect and through the captain of the ship, who was a stockholder and officer of Liberian Carriers, Inc., and received Lloyd's certificate of approval of the Shipyard's work pursuant to the contract and had waived a sea trial and had taken the ship from the Shipyard to Port Tampa for refueling before the time of entering into the compromise settlement with the Shipyard and, in such settlement, approved and accepted the work performed by the Shipyard on the SS. "*Alpha*", it would appear, and the Court holds that Liberian waived any claim for damages whether on account of delay or defective reconditioning or installation.

13. If Liberian, after accepting and approving the work of the Shipyard, could, under the law, assert a proper claim for damages on account of alleged defects in reconditioning and installation of the engine, boilers and equipment, which this Court has held it could not, in such case the burden of proof was on Liberian to establish by a preponderance of the proof that the difficulties experienced in operating the ship as complained of by Liberian were in fact caused by faulty reconditioning or installation by the Shipyard. Though the Court permitted Liberian, over objections of counsel for the Shipyard, to put in all the proof it had on the issue, Liberian was unable to prove by a preponderance of the evidence, and the preponderance of the evidence fails to show, that the reconditioning and installation were faulty, resulting in the difficulties experienced at sea. The Court is convinced by the evidence that such difficulties arose largely, if not altogether, by reason of the mishandling of the engine and machinery in the engine room by an incompetent, indifferent and inexperienced crew who knew little or nothing about proper care and operation of compensating engines. In such state of the evidence, Liberian is not entitled to relief in this libel suit and R. J. Chianelli is not entitled to the benefit of such defense to the promissory note by way of reduction or to any part thereof.

14. The Court finds that Tampa's bill for Mr. Fond's Services in the amount of $1,180.08 is reasonable.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction over both the parties and the subject matter, except that jurisdiction over the vessel was never obtained by service of process. With respect to the admiralty actions the contract to install reconditioned engines and boilers is properly characterized as a repair contract rather than a contract for original construction. *The Jack O'Lantern*, 258 U. S. 96 (1922); *KY-ILL*, 50 F. 2d 70, (6 Cir. 1931). The ship repair contract is maritime in nature and governed by the Federal law. *North Pacific S. S. Co.* v. *Karl Bros. Co.*, 249 U. S. 113, 128-129 (1919).

With regard to the civil action, the sum in controversy exceeds $10,000 and there is diversity of citizenship, ~~the owners being a Liberian corporation and the Shipyard a Florida corporation.~~

[Correction June 7, 1961 F. L. W. P. J.]

2. The Shipyard obligation under the contract was only to recondition and install the propelling machinery in "operating condition to Lloyd's approval." The Shipyard did not warrant that this would be a "commercially usable vessel". The repair contract did not specifically guarantee the sufficiency of the work to produce the desired end result, but merely was a contract to perform work in accordance with approved plans and specifications. The Shipyard fulfilled its obligation when it performed the work in the manner specified. The Shipyard did not impliedly warrant the plans, but merely undertook to follow them. The Owners who had the power to determine the sufficiency of the plans, must bear the risk that they were adequate for the purpose to be accomplished.

3. The engines and boilers sold to the Owners by the Shipyard were second hand, and therefore there was no implied warranty of their quality, condition, or fitness (*Bayer* v. *Winton Motor Car Co.* (1916) 194 Mich. 222, 160 N. W. 642; *Chiquita Min. Co.* v. *Fairbanks, M. & Co.* (1940) 60 Nev. 142, 104 P. 2d 191; *Hanna Breckinridge Co.* v. *Holley-Matthews Mfg. Co.* (1911) 160 Mo. App. 437, 140 S. W. 923; see *McDonald* v. *Sander* (1931) 103 Fla. 93, 137 So. 122), particularly since the buyer had inspected them. *Johnson* v. *Carden* (1914) 187 Ala. 142, 65 So. 813; *Oil City Iron Works* v. *Belmont* (1928) 177 Ark. 223, 7 S. W. 2d 772; see also 151 A. L. R. 446.

4. The Court finds that the Owners have failed to show by a preponderance of the evidence that the Shipyard breached the contract. But if the Shipyard had improperly performed its work, the action of the Owners in accepting the vessel after a full and complete inspection would have constituted a waiver of all claims for defects which were discoverable.

The subsequent reduction in price by the Shipyard and the concessions by the Owners also constituted an accord and satisfaction of all existing claims.

5. There was no delay in completion for which the Shipyard was responsible. But even if there had been delay giving rise to a claim for recoverable damages, such damages would have been controlled by the provision in the contract limiting recovery for delay to agreed liquidated damages in the sum of $2,000 per day, and not exceeding a total or maximum of $20,000.

6. Respondent's assertion of a lien for a greater amount than was due did not constitute duress or undue influence so as to make the final agreement with respect to price voidable. *Martin* v. *The "Amiga Mia"*, 80 F. Supp. 42, 50 (S. D. N. Y., 1948); *Ira S. Bushey and Sons* v. *W. E. Hedger Transp. Corp.*, 167 F. 2d 9.

7. The Tampa Ship Repair & Dry Dock Company is entitled to succeed in each of the three cases before the Court consolidated for trial, namely, Civil 192-47 and Admiralty Nos. 192-128 and 192-328.

8. The evidence establishes the validity of the note, due presentment and protest. Plaintiff is entitled to recover the full balance due on the promissory note given plaintiff by Liberian Carriers, Inc. on May 6, 1957, and costs of suit and reasonable attorneys' fees, fixed by the Court in the amount of $3,500.

This sum of attorneys' fees is arrived at on the basis of recovery on the note alone in a contested law suit and makes no allowance for counsel's services and fees in the admiralty cases.

The Admiralty Suit No. 192-128 would have been filed in any event, and therefore it is a part of a bigger lawsuit than the recovery on the note.

9. Plaintiff is entitled to recover a sum equal to the full balance due on said promissory note with interest, costs and attorneys' fees as set forth above from R. J. Chianelli or J. F. Swenson, individually, or both, but may not recover more than the sums herein found due and payments made by any defendant or respondent shall pro tanto discharge the liability of the other defendants and respondents.

Also the Shipyard is entitled to succeed in its cross-libel in Admiralty No. 192-328.

10. Finally, Tampa is entitled to recover the amount paid by Tampa to Mr. Fond for his expenses and services in New Orleans in connection with the repair work done there in the sum of $1,180.08 against Liberian Carriers, Inc.

Dated the day of June, 1961,
New York, N. Y.

.....

U. S. D. J.

Final Decree Appealed From.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LIBERIAN CARRIERS, INC., Owner of the Tanker "*Alpha*",
Libelant,
against
TAMPA SHIP REPAIR & DRY DOCK CO., INC.,
Respondent.

Ad. No. 192-128

TAMPA SHIP REPAIR & DRY DOCK CO., INC.,
Cross-Libelant,
against
S.S. ALPHA, her boilers, engines, etc., and LIBERIAN CARRIERS, INC.,
Cross-Respondent.

Ad. No. 192-328

The above-entitled suits having duly come on to be heard before the Court on the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th and 10th days of May, 1961, upon the pleadings and proof, and having been argued and submitted by the advocates of the respective parties on the 19th day of May, 1961, and the Court, after due deliberation having rendered its opinion orally on the 31st day of May, 1961, directing a decree dismissing the libel in the first of the above-entitled suits and granting recovery to respondent-cross-libelant on the cross-libel in the second of the above-entitled suits of the full balance due on a promissory note given respondent-

cross-libelant by libelant-cross-respondent on May 6, 1957 which balance is in the amount of $40,688.12 with interest thereon at five percent (5%) per annum from June 6, 1957, to the date of entry of this decree amounting to $8,137.62, and reasonable attorneys' fees as provided in said note which said fees have been fixed by the Court in the amount of $3,500.00, and $1,180.08 for expenses and services rendered at the request of libelant-cross-respondent together with costs.

Now, on motion of Healy, Baillie & Burke, proctors for respondent-cross-libelant, it is.

ORDERED, ADJUDGED AND DECREED, that the libel in the first of the above-entitled suits be and the same hereby is dismissed on the merits, and it is further

ORDERED, ADJUDGED AND DECREED, that the libel in the libelant have and recover against Liberian Carriers, Inc. and its stipulators the sum of $40,688.12 with interest thereon at five percent (5%) per annum from June 6, 1957 to the date of entry of this decree amounting to $8,137.62, the sum of $3,500.00, and the sum of $1,180.08 together with costs of suit amounting in all (exclusive of costs) to the sum of $53,505.82 with interest thereon until paid and that respondent-cross-libelant have execution therefor, and it is further

ORDERED, ADJUDGED AND DECREED, that unless this decree be satisfied or proceedings thereon stayed by an appeal within ten (10) days after entry of this decree, the respondent-cross-libelant have execution against the libelant-cross-respondent and its stipulators, their goods, chattels and lands, forthwith to satisfy this decree.

FRED G. WHAM,
U. S. D. J.

Dated: New York, N. Y.
June 6th, 1961.

First Contract.

[Letterhead of Tampa Ship Repair & Dry Dock Co.]

November 16, 1956

It is agreed that for the maximum of $225,000.00 Tampa Ship Repair & Dry Dock Co., Inc. will take out the old main engine, auxiliary equipment and boiler now aboard the *Alpha* and replace with the main engine, two Scotch boilers and auxiliary equipment aboard and taken off the *SS. Cortes*. This equipment to be placed aboard the *Alpha* shall be reconditioned before placing it aboard and said equipment shall pass a Lloyds special survey. This price includes all the parts, necessary tubes, pipes, valves, etc. to do the job correctly according to Lloyds and owner's surveyors.

It is further agreed that Tampa Ship Repair shall send a man aboard the *Alpha* now in the port of Boston no later than Monday, November 19, 1956 to make a more detailed report in the hope of revising this price downward and that it is further agreed that the Owners, Liberian Carriers, Inc. shall say minimum $200,000.00 is their price. This price also subject to their Marine Architect's drawing and writing up plans and specifications and approving this engine and its equipment for the installation in the *Alpha*. Tampa Ship Repair also guarantees that with this equipment on board, the vessel will make at least 10 knots fully loaded and maybe more. It is further agreed that this offer made by Liberian Carriers, Inc. shall be subject to drydocking in Tampa and upon inspection of the hull it is found that in order to have the hull pass special survey by Lloyds the owners must pay over $50,000.00 in addition to their agreed price on the installation of the machinery, this agreement is null and void and the deposit money returned to the owners, Liberian Carriers, Inc. The deposit money on the equipment for the *Alpha* shall be in the amount of $10,000.00.

Second Contract.

It is agreed further that the combined work to take out the old machinery and boiler and install new machinery and boilers and all the equipment necessary to run the engine room correctly according to Lloyds special survey this work shall not take over 40 working days.

TAMPA SHIP REPAIR & DRY DOCK CO., INC.

SAM F. DAVIS,
President

LIBERIAN CARRIERS, INC.
R. J. CHIANELLI,
President.

Second Contract.

CONVERSION CONTRACT

November 28, 1956

This contract made the 28th day of November, 1956 by and between Tampa Ship Repair and Dry Dock Co., Inc., a Florida Corporation, of Tampa, Florida, hereinafter called "Shipyard" and Liberian Carriers, Inc., of Liberia, hereinafter called "Owner".

WITNESSETH: That the said Shipyard and Owner, for the consideration hereinafter named, agrees as follows:

ARTICLE 1, SCOPE OF THE WORK. The shipyard shall remove the existing main engine, boiler and directly associated auxiliaries from the engine and boiler spaces of the vessel *Alpha* and install the main engine, boilers and associated auxiliaries formerly on the vessel *Cortez*. The latter equipment shall be reconditioned by the Shipyard to Lloyds approval and installed with such piping and valves as required to place the propelling machinery in an operating

condition to Lloyds approval. It is further understood and agreed to by the Owner, and the Shipyard, that the work to be performed concerns only the propelling machinery, boilers and directly associated auxiliaries for propulsion only. These boilers will not furnish sufficient steam to drive the vessel at full speed while cargo heating coils and cargo pumps are being operated. Steam main for existing unchanged steam driven auxiliaries, heating and steam smoothering will be connected to newly installed boilers thru reducing valves. The three generators removed from the vessel *Cortez* will be reconditioned as for main propulsion unit and installed in vessel *Alpha*, all reconnected to present switchboard and in readiness for operation. Such work to be performed by the Contractor will include steel welded foundations for machinery as mentioned above only insofar as those parts above the engine room inner bottom. Any steel work required by the Owner or Lloyds in the form of modifying existing floors, additional inner bottom plating or tank top doubles, will be done by Shipyard at an agreed extra price based on welded structure at 60¢ per pound installed and an extension of time, if required, over and above that mentioned in Article 2. Present stack will be altered for new boiler uptakes and relocated to suit with present boiler fidley, airheaters, etc., modified to suit, installed under with old openings closed by welded construction. It is to be understood that any existing structure found wasted beyond use will be repaired and or renewed by Shipyard as directed by Owners and Lloyds, with cost and time of work adjusted same as inner bottom mentioned above.

Shipyard will install new sea suction and valve, and overboad discharge and valve along with necessary piping, if existing main engine sea suction and overboard discharge shell connections are found to be too small to equal the size of the main condenser circulating pipe now on the vessel *Cortez*.

Second Contract.

Owners will have present bronze wheel reconditioned and altered to suit H. P. and R. P. M. of main engine from vessel *Cortez*, and delivered freight prepaid to yard of Shipyard. Shipyard will re-install present tail shaft (now drawn into shaft alley) install wheel along with present nut key and fairwater cap. Any missing parts will be furnished by Shipyard as an extra, and rewooding of stern bearing if found necessary will be done by Shipyard as an extra, with extra cost and time of completion (per Article 2) as later agreed upon.

Insulation and lagging will be applied to newly installed boilers, steam and exhaust piping, hot drain and hot oil pipe, feed heater and fuel heater and evaporator by Shipyard, and present insulation on existing steam and exhaust pipe where damaged or cut for re-engining work, will be required by Shipyard based on the invoice for such work submitted by Shipyards insulating subcontractor, but such cost will not exceed $6,000, and no additional time over that mentioned in Article 2 will be allowed.

Shipyard will carry out such minor work as required by Lloyds rules to satisfaction of Lloyds surveyor, such as furnishing and installating drip pans under boiler burners, remote shut off of fuel pumps and regulator for feed pumps. Any additional work required by Lloyds Surveyor on existing piping and machinery will be done by Shipyard, at an agreed extra cost and (if required) an extension of time of work per Article 2.

It is understood that the existing safety valves on the boilers removed from the vessel *Cortez* are acceptable to Lloyds Surveyor, and will be reconditioned and re-installed by Shipyard.

Shipyard will quote an extra price on the furnishing and installation of soot blowers in boilers as recommended by Lloyd's Surveyor, and the Owners will then decide upon the installation of same based on Shipyards quotation on price and time of completion.

Second Contract.

Present line shafting (suctions forward of the tail shaft) will be altered by Shipyard so that flange will match up with that on engine removed from vessel *Cortez*, and an 8'-0" length will be provided for later possible installation of in line type reduction gears.

Shipyard will assist Owner in arranging for the installation of a fixed pipe CO_2 fire extinguishing system in the engine-boiler room, to Lloyds approval by Walter Kidde or equal subcontractor, and for Owners direct account.

Should the Owners desire additional work such as the installation on modifications of other equipment, such as fire fighting equipment, auxiliary condensor piping not associated with the propelling or generation equipment, gas freeing or special work required by Lloyds Surveyor (on structure or equipment not associated with the main propelling machinery) such work will be performed by Shipyard at an agreed extra price and a change in completion time per Article 2.

All plans and drawings required by Shipyard to carry out the work described herein will be prepared by the Shipyard at an agreed extra price of $4,000.00, which price will be considered as a maximum figure and, on completion, Owner will pay Shipyard actual cost of work based on time spent per Shipyard's accounting record at a rate of $5.00 per hour, but not to exceed a total of abovementioned $4,000.00. It is agreed that the plan work will start at the time the vessel *Alpha* is delivered to yard of Shipyard with engine room inner bottom tanks opened up, cleaned and gas freed, and ten calendar days will be required to complete plans of engine room arrangement and boiler and main engine foundation for submission to Lloyd's New York office. On the return of said plans by Lloyds to Shipyard, approved with minor amendments and revision, the time of Conversion work per Article 2 will commence.

Shipyard will furnish services of certified chemist to check vessel and furnish Owner with copy of certificate.

Second Contract.

Any further cleaning required by chemist will be done by Shipyard at an agreed extra price and time (if required).

It is agreed that the Owner will furnish the services of a Lloyd's Surveyor and bear the fees of all classification inspection and certificates.

ARTICLE 2. TIME OF COMPLETION: The work to be performed under this contract shall be commenced upon arrival of the vessel at the Shipyard's plant at Tampa, Florida or upon receipt of approved plans as covered in Article 1, whichever is the later, and shall be completed in forty (40) working days thereafter. In the event that the Shipyard's work is delayed by non arrival of any item of Owner furnished equipment or by delays incurred by plan revisions, the time of completion shall be extended by a period equal to the delay. Upon completion of the work, the vessel shall be accepted by the Owner at the Shipyard's plant. It is understood that the Shipyard works a five day week, legal holidays excluded.

ARTICLE 3. THE CONTRACT SUM: The Owner shall pay the shipyard for the performance of the Contract, subject to additions and modifications provided herein, in currency of the United States of America, at Tampa, Florida, the sum of Two Hundred Twenty-Five Thousand Dollars ($225,000.00).

ARTICLE 4. PROGRESS PAYMENTS: The Owner shall make payments on account of the Contract as follows:

Upon arrival of the vessel at the Shipyard's Plant	$10,000.00
Upon removal of obsolete machinery boilers and auxiliaries	20,000.00
Upon installation of main engine	60,000.00
Upon installation of boilers	50,000.00
Upon installation of all auxiliaries	60,000.00
Upon completion of all contract work	25,000.00

Second Contract.

All extra will be paid to Shipyard by owner within thirty (30) calendar days of completion of contract work.

ARTICLE 5. CHANGES IN THE WORK. The Owner, without invalidating the Contract, may order additional work or services, or may make changes by altering the work, the Contract Sum, and time of completion, being adjusted accordingly.

ARTICLE 6. DELAYS AND EXTENSIONS OF TIME. If the Shipyard be delayed at any time in the progress of the work by any act beyond its control, not imputable to the Shipyard, or by any changes ordered in the work, then the time of completion shall be extended a like amount. Such additional time is to be agreed upon between Owner and Shipyard, in writing, at the time the delay occurs and or at the time the change and or extra is authorized by Owner.

ARTICLE 7. INSURANCE. The Shipyard shall maintain such insurance as will protect it from claims under Workmen's Compensation acts and from claims for damages because of bodily injury, including death which may arise from and during operations under this Contract.

The Owner shall be responsible for and at his option may maintain such insurance as will protect him from his contingent liability to others for damages because of bodily injury, including death, which may arise from operations under this Contract.

The Owner shall effect and maintain fire insurance upon the entire vessel on which the work of this Contract is to be done to 100% of the insurable value thereof, including items of labor and materials connected therewith whether in or adjacent to the vessel. The Shipyard shall be designated as insured jointly with the Owner in all policies. The loss, if any, is to be made adjustable with and payable to the Owner as Trustee for the insured as their interests may appear. Certificates of such insurance shall be filed with the Shipyard.

Second Contract.

ARTICLE 8, PENALTY-BONUS. It is agreed that if Shipyard completes the Conversion per this Contract in a time less than stipulated in Article 2 (as adjusted) Owner will pay a Bonus of $2,000.00 for each and every working day up to a maximum of $20,000 for 10 working days; likewise, if Shipyards time of completion exceeds that stipulated in Article 2 (as adjusted) we shall pay Owner $2,000 for each and every working day up to a maximum of $20,000.00 for 10 working days in the form of liquided damages.

IN WITNESS WHEREOF, the parties hereto have caused this Contract to be duly executed by their proper officers thereunto duly authorized, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

TAMPA SHIP REPAIR AND DRY DOCK CO., INC.

Signed, sealed and delivered in the presence of:

By: .....
President

Attest: .....
Secretary

.....
As to Shipyard

SHIPYARD

LIBERIAN CARRIERS, INC.

By: .....
President

Attest: .....
Secretary

.....
As to Owner.

OWNER